In the Supreme Court of the United States

OCTOBER TERM, 1925.

No. 190.

CLARENCE H. VENNER, *Appellant*,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANT.

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STATEMENT.

This suit, originally brought in the Cuyahoga County, Ohio, Court of Common Pleas, on November 9, 1922, by the appellant, Clarence H. Venner, a citizen of New York, against The Michigan Central Railroad Company, a citizen of Michigan, was removed by defendant to the District Court for the Northern District of Ohio, Eastern Division, on the ground of diverse citizenship.

There an amended bill was filed (Rec. 13), and thereupon the case was dismissed for want of jurisdiction, on motion of the defendant. Upon the certificate of the district judge, the plaintiff brings this direct appeal.

Plaintiff sued, as a minority stockholder of the defendant, to enjoin the issue of $12,660,000 trust certificates of the "New York Central Lines Four and One-half Per Cent Equipment Trust of 1922," on the grounds, first, that no orders authorizing such issue of certificates and acquisi-

tion of equipment were obtained under the State public service commission laws of New York, Illinois, Michigan and Ohio, and, secondly, that the transaction is an unlawful intercorporate guaranty and loan of credit by the defendant, acting with its natural competitors, The New York Central Railroad Company and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, under unlawful and monopolistic domination by the former through stock control and interlocking directorates.

The amended bill discloses also the defendant's claim, that the issue of equipment trust certificates is legalized and validated, in both respects, by the order of the Interstate Commerce Commission made *pendente lite* on December 8, 1922, pursuant to the provisions of the Interstate Commerce Act, Section 20 a, (added by the Transportation Act, 41 Stat. L. 494), regulating security issues by railroads engaged in interstate or foreign commerce, and providing in paragraph (7) that "The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein." The district court, agreeing with this theory, predicated the dismissal of the suit upon the disclosures of the amended bill in this behalf.

ARGUMENT.

The amended bill sets forth that each of said companies operates lines of railroad in the States of Ohio, Michigan, Indiana and Illinois, while the defendant also operates lines in New York and the Dominion of Canada, and the New York Central in the same and other states. It further avers that to defendant is appropriated about one-sixteenth of the equipment to be acquired by means of said certificates, and that it purposes (Rec. 15) "to use some or all of the same in the State of Ohio, and parts in each of the other States in which its lines are operated, and that other portions of said equipment will be similarly acquired by said other railroad companies and be used by them within and without the State of Ohio," etc.

The public service commission statutes of New York, Ohio, Michigan and Illinois, cited in the amended bill (Rec. 16), in substance prohibit the issuance by a railroad corporation operating under the laws of any of such States, of stocks, bonds, notes and other evidences of indebtedness, payable at periods of more than twelve months after date thereof, for the acquisition of property, the construction, completion, extension or improvement of its facilities or the improvement or maintenance of its service within such State, without the consent, permission and authority of such commission by its order first duly applied for and made, fixing the amount, character and terms of such issue and the purpose to which such issue or any proceeds shall be applied, and making void all issues in contravention of such requirements, and also forbidding such railroads to apply any such issue or its proceeds to any purpose not so specified.

Within the respective boundaries of the States mentioned, these statutes govern the issue of railroad securities and the acquisition of railroad equipment by means

thereof in all cases which are not embraced within the scope of the commerce clause of the Federal Constitution, or which being so embraced, are without the field actually occupied by the legislation of Congress concerning interstate and foreign commerce.

The district court, without evidence, and solely upon the averments of the amended bill, erred in dismissing this case for want of jurisdiction and upon the ground that the jurisdiction exercised by the Interstate Commerce Commission on the same subject matter is exclusive and subject to judicial review only in the manner provided by the District Court Jurisdiction Act (38 Stat. L. 219), viz., "by three judges, of whom at least one shall be a circuit judge."

In *Texas v. Eastern Texas R. R. Co., et al.*, 258 U. S. 204, the defendant railroad was an instrumentality of both interstate and intra-state commerce, and the case involved a similar supposed conflict between a State statute and a clause, verbally identical with the one here involved, of the Interstate Commerce Act (Section 1 (20), 41 Stat. L. 476), which provides that when the Interstate Commerce Commission issues a "certificate that the present or future public convenience or necessity" permits of the abandonment of a line of railroad, "the carrier by railroad may, without securing approval other than such certificate, comply" etc. The first of the two cases there reported together was a suit originally brought in the State court to enjoin a railroad engaged in both interstate and intra-state commerce, from discontinuing the operation of its line for the latter purpose without permission from the state commission, although an order of the Interstate Commerce Commission authorized the absolute abandonment thereof. This Court sustained the right to maintain such a bill.

Declaratory of the general construction of the Interstate Commerce Act (41 Stat. L., 476), it is provided by Section 1, (17) "That nothing in this Act shall impair or affect the right of a state, in the exercise of its police power, to require just and reasonable freight and passenger service for intra-state business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act."

Constitutional limitations aside, conflicts of Federal and State statutes regulating commerce by railroad carriers are not reconciled in any uniform manner by the Interstate Commerce Act. On the subjects of railroad consolidation and of rate or service discrimination its language in this respect is uncompromising, viz., "the law of any state or the decision or order of any state authority to the contrary notwithstanding." 41 Stat. L. 481, Sec. 5, (6), (c), and 41 Stat. L. 484, Sec. 13, (4). And authorized consolidations are relieved of all "restraints or prohibitions by law, *State or Federal*, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section." 41 Stat. L. 480, Sec. 5, (8).

Significantly variant are the corresponding provisions, previously cited, in respect to the construction, extension, operation and abandonment of lines of railroad, viz., "without securing approval other than such certificate," i. e., other *Federal* approval; or, the like provision here involved in respect to the issuing of securities and the assuming of obligations, "without securing approval other than as specified herein." The two latter classes of orders by the Interstate Commerce Commission are, moreover, generally if not always, purely permissive; whereas those relating to discriminations are compulsory and enforceable, "the deci-

sion or order of any State authority to the contrary notwithstanding."

Section 20 a, (2), of 41 Stat. L. 494, makes it "unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person natural or artificial, *even though permitted by the authority creating the carrier corporation,*" without the Commission's order authorizing the same. This contemplates in appropriate circumstances a conjunctive or dual Federal and State jurisdiction.

Construing all these various clauses and phrases, one with another, it is apparent that if the Federal and State commissions were intended to be limited to mutually exclusive jurisdiction in relation to issues of securities, instead of a double jurisdiction when the case requires, Congress would have said plainly that wherever interstate commerce is substantially involved, even though intra-state commerce is also involved, the lawful orders of the Interstate Commerce Commission shall prevail, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Where interstate and intra-state commerce are so intermingled that Federal control or regulation, when exercised, must be exclusive in order to be effective over the former, then State laws must yield to Federal legislation when Congress elects to occupy the field; or, even without such Federal occupation, whenever a State statute becomes substantially obstructive to interstate commerce.

But wherever separate regulation is reasonably possible, or where Congress manifests no clear purpose to

wrest from the States their previously exercised visitorial and police powers over the corporate instrumentalities of commerce created by State laws, the inference of an absolute ouster of State control should not readily be indulged.

A railroad corporation of the State of Michigan, engaged in both interstate and intra-state commerce, but shorn of all the important elements of its State charter, and equipped instead with entirely new powers and disabilities, engrafted upon it by Federal law and administered by the discretionary orders of a Federal commission, is a grotesque and unwelcome conception, which would deprive a minority stockholder of the benefit of the *Dartmouth College* case rule. He could seldom or never invoke equitable redress of corporate abuses, because there would be no stable test of *ultra vires* conduct.

In the instant case the Michigan Central Railroad Company is authorized by the Interstate Commerce Commission to enter into "a joint and several Equipment Trust Agreement" covering $12,660,000 of certificates, and among other things to "specifically agree to pay the amount of the principal of said certificates and of the dividend warrants belonging thereto representing interest thereon, as such certificates and warrants respectively become due and payable." (Rec. 15). The above amount represents three-fourths of the cost of $16,915,000 of equipment, whereof the defendant is allotted only $1,026,000. The ratio of its risk to its interest is 16 to 1; and a minority stockholder may well object to such a transaction, however well safeguarded the guaranty may be, especially since the defendant's entire capital stock is only $18,736,400.

Under said Section 20 a, (2), "the Commission by order authorizes such issue or assumption" of obligations only if it finds that the proposed indebtedness "is for some lawful object within its corporate purposes," etc. If the

Commission's order approving this Equipment Trust Agreement implies that it found this *ultra vires* guaranty by The Michigan Central Railroad Company to be a "lawful object within its corporate purposes," such finding is not administrative but judicial; nor does the entry of such an order restrict the complainant here, as a minority stockholder, to the mode of redress prescribed by the District Court Jurisdiction Act, 38 Stat. L. 219, and the Commerce Court Act, 36 Stat. L. 539, Secs. 4 and 5. In such case resort may be had to the State and Federal courts in the first instance, because the issue is the validity of laws which control the action of the carrier and hence present a question of general law for a judicial tribunal, and not one competent for an administrative body. *Louisville etc. R. Co. v. F. W. Cook Brewing Co.,* 223 U. S. 70, 84, (Syl. 10).

That the guaranty recited in the amended petition (Rec. 15 and 18) is *ultra vires,* unlawful and void, is evident from the rule of *Louisville etc. Ry Co. v. Louisville Trust Co.,* 174 U. S. 552, 567, where it is said:

> "A railroad corporation, unless authorized by its act of incorporation or by other statutes to do so, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires,* unlawful and void, and incapable of being made good by ratification or estoppel."

See also *Pollitz v. Public Utilities Commission,* 96 O. S. 49, Syl. 4:

> "A railroad corporation which is subject to the laws of Ohio has no authority, express or implied, to enter into a joint contract of guaranty, by which it jointly with other companies guarantees an entire issue or series of bonds, issued by another company of which the Ohio company owns only a portion."

See also the opinion of Taft, J., in *Humboldt Mining Co. v. American Mfg. & M. Co.*, 62 Fed. 356, wherein the present Chief Justice said:

> "The general rule in this country and England is that one corporation is impliedly prohibited from guaranteeing the contract or debt of another."

In *In re Johnson Foreign Patents Co., Ltd.*, L. R., 2 Chancery Division 234 (1904), a celebrated English case often cited, the court held and decreed,

> "that the debentures in so far as they purport to effect a joint borowing by the three companies are *ultra vires* and void; but that the respective debenture holders are entitled to hold the debentures as a good security against each company to the extent to which the proceeds of the issue reached each company."

The defendant contends not only that said Section 20 a, sets aside conflicting provisions of the State public service commission acts but that the order of the Interstate Commerce Commission authorizing this issue of Equipment Trust Certificates clothes the Michigan Central Railroad Company with corporate power where necessary to supply deficiencies or to countervail denials of power in the State corporation laws to which it is subject. Such a delegation by Congress of discretionary legislative authority to a commission is inadmissible under the grant and limitations of legislative power contained in sections 1 and 8, Article I of the Federal Constitution.

The same contention also contravenes at least two other clauses of the Constitution, viz., the tenth amendment, which provides that "the powers not delegated to the United States by this Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people"; and the fifth amendment, which provides that no person shall be deprived of life, liberty or prop-

erty without due process of law, in that the plaintiff is thus deprived of his right as a minority stockholder to the protection of the laws of the states under which the defendant was incorporated and in which it operates.

The decree of dismissal of the amended bill and of the suit, for want of jurisdiction, should be reversed on the authority of *Texas v. Eastern Texas R. R. Co., et al.*, 258 U. S. 204, cited *supra*.

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